SEP 19 1955

HAROLD B. WILLEY, Clerk

No. 406

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

* * *

WICHITA FALLS & SOUTHERN RAILWAY CO., *Petitioner*

vs.

BEN N. GIFFORD, *Respondent*

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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No.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

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WICHITA FALLS & SOUTHERN RAILWAY CO., *Petitioner*

vs.

BEN N. GIFFORD, *Respondent*

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Wichita Falls & Southern Railway Company respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit rendered in this cause on the 30th day of June, 1955, and the order of the Court of Appeals for the Fifth Circuit, denying a motion for rehearing in this cause on the 9th day of August, 1955, and respectfully shows the following:

I

JURISDICTIONAL STATEMENT

1. The date of the judgment sought to be reviewed by writ of certiorari is dated June 30, 1955. (Tr. pages 85 to 91), not yet reported.

2. The date of the order overruling motion for rehearing, likewise sought to be reviewed by writ of certiorari, is August 9, 1955. (Tr. pages 122 to 124), not yet reported.

3. The date of the order staying the mandate in the Court of Appeals for the Fifth Circuit is the 29th day of August, 1955, and said order stays the mandate for a period of thirty (30) days from such date in order that your petitioner might petition this Court for a writ of certiorari. (Tr. page 127).

4. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

II

QUESTIONS PRESENTED FOR DETERMINATION

Respondent, as plaintiff, sued petitioner, Wichita Falls & Southern Railway Company, a corporation, as defendant, and the undisputed evidence shows no cause of action against petitioner, but shows a probable cause of action against an entirely different corporation, *not* a party to the suit. The Trial Court sustained petitioner's motion to dismiss as to it, and, by implication, overruled respondent's motion to amend his complaint and insert therein the name of the proper party in lieu of petitioner on the alleged ground of misnomer. The undisputed evidence shows there is no misnomer, but, on the other hand, that petitioner, the party sued, and the other party sought to be brought in by the amendment, are separate and distinct entities.

1. Did the Court of Appeals for the Fifth Circuit err in refusing to follow the decisions of the State Court of last resort, as required by the holding of the Supreme Court of the

United States, in the case of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, and as expressly required by Rule 17 (b) F. R. C. P.?

2. Does Rule 15 of the F. R. C. P. permit respondent to amend his complaint to substitute Wichita Falls & Southern *Railroad* Company, a corporation, for or in lieu of Wichita Falls & Southern *Railway* Company, a corporation, as a party defendant, and permit respondent to proceed to trial against the new corporation defendant without service of summons on said new defendant, and without appearance by such defendant?

STATEMENT OF THE MATTER INVOLVED

This action was brought by respondent as plaintiff under the F. E. L. A. to set aside a release executed by him and to recover damages for personal injuries. (Record pages 1 to 10). The petitioner herein, Wichita Falls & Southern *Railway* Company was the sole defendant. Petitioner filed answer denying all allegations. (Record pages 11 to 13).

Respondent, under Rule 36 of the F. R. C. P. made request for admissions. (Record pages 14 to 16). Petitioner, Wichita Falls & Southern *Railway* Company, replied under oath, denying the matters stated in the request. (Record pages 16 to 19).

Petitioner filed motion in Trial Court for separate trial upon the issue of the validity of the release, which was granted. The Trial Court directed a verdict for petitioner, holding that the release executed by respondent was valid. Respondent appealed to the Court of Appeals, which reversed the decision of the Trial Court, holding that the question of the validity of the release was a disputed issue and should have been sub-

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mitted to the Jury. (*See 211 F. 2nd. 494*). The case was never tried on its merits.

In the Trial Court, petitioner filed motion to dismiss, or, in the alternative, for a summary judgment. (Record pages 20 and 21). Respondent filed motion for leave to amend the complaint (only) by correcting what he alleged to be a misnomer of the defendant and for no other purpose. (Record pages 22 and 23). The two (2) motions were heard by the Court, and at the conclusion thereof, the Trial Court dismissed respondent's alleged cause of action against petitioner, Wichita Falls & Southern *Railway* Company. (See record, pages 29 and 30). The Trial Court filed his findings of fact and conclusions of law. (See record pages 31 to 33). The Trial Court found that petitioner, Wichita Falls & Southern *Railway* Company is a Texas corporation and in good standing as such. The Court found that Wichita Falls & Southern *Railroad* Company, which is not a party to this suit, is a Texas corporation and that it is in good standing as such. The Trial Court found that respondent was never in the employment of petitioner, Wichita Falls & Southern *Railway* Company, and that he had no cause of action against petitioner. The Trial Court dismissed respondent's complaint as to petitioner, Wichita Falls & Southern *Railway* Company. (Record pages 31 to 33).

The Court of Appeals for the Fifth Circuit likewise finds that petitioner, Wichita Falls & Southern *Railway* Company and Wichita Falls & Southern *Railroad* Company are separate and distinct entities and that respondent was in fact an employee of Wichita Falls & Southern *Railroad* Company. (See Tr. of record 87). The Court of Appeals for the Fifth Circuit definitely holds that two (2) decisions of the Texas Court of Civil Appeals, viz: *Wichita Falls & Southern Railway Com-*

pany vs. Foreman, 109 S. W. (2d) 549, and *Gillette Motor Transport Company vs. Whitfield,* 160 S. W. (2d) 290, clearly support petitioner's contention in this case and that if they are controlling upon the Court of Appeals, are decisive of this case in petitioner's favor. (Tr. of record, pages 87 and 88).

The Court of Appeals for the Fifth Circuit then erroneously holds that the Texas cases are not controlling, and that neither the doctrine of *Erie Railroad vs. Tompkins,* 304 U. S. 64, nor Rule 17 (b) F. R. C. P. requires application of the state law in this instance. (See Tr. of record, pages 87 and 88). The Court of Appeals reversed the judgment of the Trial Court and condemned petitioner, Wichita Falls & Southern Railway Company to pay the cost of appeal. (Tr. of record, page 91).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in reversing the action of the Trial Court is contrary to the well-known doctrine established by the Supreme Court of the United States in the case of *Erie Railroad vs. Tompkins,* 304 U. S. 64, and if the opinion and judgment of the Court of Appeals for the Fifth Circuit be allowed to stand, it will establish a dangerous precedent holding that a Trial Court has jurisdiction to render a judgment against a party who is brought into the case by an amendment and without service of summons or complaint on such party, and without an appearance in court by such party. The Court of Appeals correctly held that the decisions of the Texas Court of Civil Appeals, viz: *Wichita Falls & Southern Railway Company vs. Foreman,* 109 S. W. (2d) 549, and *Gillette Motor Transport Company vs. Whitfield,* 160 S. W. (2d) 290, support the petitioner's contention, but erroneously refused to apply the doctrine announced by *Erie Railroad vs. Tompkins,* 304 U. S. 64.

2. The Court of Appeals has erroneously held that Rule 15 of the F. R. C. P. supports the right of respondent to amend the complaint and substitute the Wichita Falls & Southern *Railroad* Company (a new party defendant), for the Wichita Falls & Southern *Railway* Company, as party defendant. (See Tr. of record, page 87). The decision of the Court of Appeals for the Fifth Circuit is contrary to the decision of the Supreme Court of the United States in the case of *Davis vs. L. L. Cohen and Company, Inc.*, 268 U. S. 638. The opinion is contrary to the decision of *Schwartz vs. Metropolitan Life Insurance Company*, 2 F. R. D. 167, which cites and follows *Davis vs. L. L. Cohen and Company*, supra, and *L. E. Whitham Const. Co. vs. Remer*, (10th Circuit), 105 F. (2d) 371. The decision is contrary to the case of *Watson, et ux, vs. Employer's Liability Assur. Corp., Ltd. et al*, (5th Circuit), 202 F. (2d) 407.

The decision of the Court of Appeals in this case is contrary to the case of *Third National Bank and Trust Company of Springfield, Mass. vs. White*, 58 F. (2d) 411; *Herbert vs. Payne*, 291 F. 555; *Kerner vs. Rackmill*, 111 F. supp. 150; *United States vs. Swink*, 41 F. supp. 98; and *Phoenix State Bank and Trust Co. vs. Bitgood*, 28 F. supp. 899.

3. It is to be noted that there is no misnomer in this case. The questions presented by this case are of great and recurring significance, and the judgment of the Court of Appeals for the Fifth Circuit, if permitted to stand, will cause much confusion among both Federal Courts and State Courts and the Bar at large. This case is one which particularly calls for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel

* * *

I certify that a copy of this petition has been served on Messrs. Philip Kouri and Jack G. Banner, 927 Oil and Gas Building, Wichita Falls, Texas, attorneys for respondent.

Leslie Humphrey

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15365

BEN N. GIFFORD,

Appellant,

VERSUS

WICHITA FALLS & SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(August 9, 1955.)

ON PETITION FOR REHEARING

Before RIVES, Circuit Judge, and DAWKINS and DeVANE, District Judges.

PER CURIAM: The petition for rehearing filed in the above styled and numbered case takes exception to the following statement in the court's opinion: "The evidence further shows that these corporations are inter-related *and subsidiaries of a third corporation.*" (underscoring supplied).

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Appellee insists there is no evidence to support the finding by the court that appellee is a "subsidiary of a third corporation."

The court has carefully reviewed the record touching this matter and since it could be the court misunderstands the testimony of a witness produced on behalf of the defendant on the subject, to avoid any possibility of error in this regard, it is

ORDERED that the words: "and subsidiaries of a third corporation" be stricken from the opinion as they appear on page 3 thereof.

Otherwise petition for rehearing is hereby

DENIED.

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15365

BEN N. GIFFORD,

Appellant,

VERSUS

WICHITA FALLS & SOUTHERN RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(June 30, 1955.)

Before RIVES, Circuit Judge, and DAWKINS and DeVANE, District Judges.

DeVANE, District Judge: This action was brought by appellant, hereinafter referred to as plaintiff, under the Federal Employer's Liability Act, to set aside a release executed by him and to recover damages for personal injuries. Plaintiff alleged in his complaint that he was injured while employed by

defendant as a bridge carpenter; that he received injuries necessitating the amputation of his right leg, and that he was induced by defendant's agent to execute a release in consideration of a lifetime job and the sum of $6,000.00. The complaint further alleged that the promise of a lifetime job was fraudulently made and the release was therefore void and of no binding effect.

Defendant answered the complaint by asserting the validity of the release and traversing plaintiff's allegations as to negligence.

On April 29, 1953 this action was tried before the court and a jury; defendant appearing and vigorously contesting plaintiff's case; which, at the conclusion of the testimony, resulted in the trial court directing a verdict for the defendant. Plaintiff appealed to this court and defendant, through counsel, resisted the efforts of plaintiff to secure a reversal of the trial court's judgment.

In an opinion reported in 211 Fed. 2nd, 494 this court remanded the case for a new trial, holding that it was error for the trial court to direct a verdict under the facts and evidence presented by plaintiff. The case was again set for trial at the October, 1954 term of court. On September 27, 1954 defendant filed a motion to dismiss the action, or in the alternative, for a summary judgment and this motion was set for hearing before the court on September 30, 1954. Prior to the hearing on defendant's motion, plaintiff filed with the court a motion for leave to amend the complaint by correcting what

he alleged to be a misnomer of the defendant. The court heard oral argument on plaintiff's motion and denied plaintiff leave to amend. Although the record discloses no order of denial the record fully supports plaintiff's claim in this regard.

After refusing to permit plaintiff to amend, the court heard evidence on defendant's motion to dismiss or for a summary judgment and at the conclusion of the testimony ordered the case dismissed. The case is before this court on appeal from the lower court's order of dismissal.

The mix-up in this case grows out of the following facts: Plaintiff brought this action against Wichita Falls & Southern Railway Company. The evidence on the motion to dismiss discloses that some years prior to the institution of this suit the Wichita Falls & Southern Railroad Company acquired all the assets of the Wichita Falls & Southern Railway Company and that the Railroad Company was, in fact, the owner and operator of the railroad property and that plaintiff was, in fact, an employee of said company. The evidence further shows that these corporation are inter-related and subsidiaries of a third corporation; that the two corporations occupy offices together and that only employees on the payroll of the Railroad Company perform services for the Railway Company.

Plaintiff relies upon Rule 15 of the Federal Rules of Civil Procedure in support of his right to amend the complaint to substitute the Railroad Company for the Railway Company as party defendant and cites numerous cases in support of his position in this regard.

Defendant relies chiefly on two decisions of the Texas Court of Civil Appeals, viz: *Wichita Falls & Southern Railway Company vs. Foreman,* 109 S. W. 2nd 549, and *Gillette Motor Transport Company vs. Whitfield,* 160 S. W. 2nd, 290. These cases clearly support defendant's contention and if they are controlling upon this court are decisive of this case in defendant's favor.

The court is of the opinion, however, that they are not controlling or even applicable in this case. The matter of amendment to pleadings is a procedural matter governed by Federal law and the Federal Rules of Civil Procedure and not by *Erie Railroad vs. Tompkins,* 304 U. S., 64. See: *Tozer vs. Charles Crause Mill,* 189 Fed. 2nd, 242; *Zumwall vs. Gardner,* 160 Fed. 2nd, 298; *Copeland Motor Co. vs. General Motors Corporation,* 199 Fed. 2nd, 566; *Grandey vs. Pacific Indemnity Co.,* 217 Fed. 2nd, 27.

In *Copeland Motor Co. vs. General Motors Corporation, supra,* Judge Hutcheson, speaking for the court, said:

> "Drawn to give effect to the principle that cases should, as far as possible, be determined on their merits and not technicalities the courts have given Rule 15 not lip service merely, but full fealty."

In *Grandey vs. Pacific Indemnity Co., supra,* Judge Rives, speaking for the court said:

> "* * * This case is governed by the Federal Rules of Civil Procedure, particularly Rule 4(h) and 15, 28 USCA. Under these liberal rules the Pacific Indemnity Company should not be permitted to take advantage of a mere misnomer that injured no one

and the District Court erred in refusing to permit the amendment of the summons and of the complaint and in dismissing the action. United States vs. A. H. Fischer Lumber Co., 4 Cir., 162 Fed. 2nd, 872. We think that Prof. Moore, citing that case with approval accurately stated the rule:

> 'The test should be whether on the basis of an objective standard it is reasonable to conclude that plaintiff had in mind a particular enity or person merely made a mistake as to the name and actually served the enity or person intended; or whether plaintiff actually meant to serve and sue a different person'."

No better cases could be found to apply these legal principles. The service made in this case would have constituted legal service upon the Railroad Company had it actually been named in the complaint and summons, instead of the Railway Company. Both corporations were, from the beginning, aware of the pendency of this action. They officed together and had common employees.

The record shows that these two corporations are affiliated in a manner known primarily to themselves and their owners and where intercorporate relationships, such as are here present, exists, it would constitute a denial of justice to permit one such corporation to pursue a policy adopted by the defendant in this case and after a long and hard trial and an appeal on which the defendant lost, then to be permitted, just before the second trial begins, to say: "You are suing the wrong person; you

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should have sued my Siamese sister," and by this action bring about a dismissal of the case and deny plaintiff the right to have his cause of action determined on its merits. Where intercorporate relationships exist in cases such as this all such corporations are held to a higher degree of frank disclosure of mistakes such as was made in this case, than is required in other cases where no close relationship exists.

The judgment in this case is wrong. For that reason the case is REVERSED and REMANDED to the lower court for further proceedings not inconsistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

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HAROLD B. WILLEY, C

No. 406

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

WICHITA FALLS & SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BEN N. GIFFORD,
Respondent.

BRIEF OF THE RESPONDENT, BEN N. GIFFORD, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. .....

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1955

WICHITA FALLS & SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BEN N. GIFFORD,
Respondent.

BRIEF OF THE RESPONDENT, BEN N. GIFFORD, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Respondent, Ben N. Gifford, respectfully files this his brief in opposition to the petition for writ of certiorari

and avers that the opinion of the United States Court of Appeals for the Fifth Circuit correctly disposes of this case.

JURISDICTION

The Petitioner has adequately alleged the jurisdictional prerequisites for filing this petition for writ of certiorari.

QUESTIONS PRESENTED

1. Are purely procedural matters in Federal courts to be limited and controlled by opinions of intermediate State appellate courts?

2. Did the service of the citation and complaint adequately apprise the defendant that it had been sued and legally summon it to appear in court?

STATEMENT OF THE MATTER INVOLVED

The statement of the Petitioner is accurate insofar as it relates to the history of this case. Respondent must challenge the Petitioner, however, in that the opinion of the Court of Appeals for the Fifth Circuit is correct in its decision of this matter. Further, the Petitioner fails to relate to this Honorable Court that when their agent was served with citation, they filed an answer contending that their release which they secured from the plaintiff was valid and binding upon the parties. Secondly, by general denial, they put in contest all the issues of the plaintiff's complaint. The Petitioner then announced ready and this case was called for trial and they proceeded to sharply contest the matters in the Trial Court upon the merits of

its release, and moved the court for a summary judgment in its favor. Such motion for summary judgment being granted, your Respondent then filed an appeal with the Court of Appeals for the Fifth Circuit. Again, the Petitioner took issue with Respondent as to the validity of its release and contested this matter before the Circuit Court of Appeals. At no time prior to the pre-trial hearing held September 30, 1954, did the defendant ever make known either to the trial court, the Circuit Court of Appeals, or the plaintiff, that this Petitioner was claiming that the wrong corporate entity had been sued.

THE DECISION BELOW IS CLEARLY CORRECT

The question first to be considered by this Court in connection with the petition for writ of certiorari is whether the Federal courts are to be bound on procedural matters by the opinions of State courts. Respondent feels that this question has been settled by numerous decisions of this Court and that such point is not now subject to misinterpretation. In a long list of decisions, this Court has clearly stated that procedural matters are to be governed by the decisions of the Federal courts.

In the instant case, Respondent moved that the Trial Court allow that the defendant's name be changed in the original complaint from the Wichita Falls & Southern Railway Company to the Wichita Falls & Southern Railroad Company in accordance with Rule 15, F. R. C. P. This matter was contested by the Petitioner. The Respondent then cited to the Court federal cases in connection with

this point, showing the proper legal test to be, whether or not it was reasonable to conclude that the plaintiff had in mind a particular entity or person to be sued, and merely made a mistake as to the name of the person or entity listed in the complaint and summons, rather than where the plaintiff actually meant to serve and sue a different person. *C. S. Grandey v. Pacific Indemnity Co., 217 F. 2d 27; Burist v. Newark Fire Ins. Co., 100 F. Supp. 751; Bowles v. Marks Hide & Tallow, 4 F. R. D. 297; Bowles v. Underwood Corp., 5 F. R. D. 25; Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175;* and *Porter v. Theo J. Ely Mfg. Co., 5 F. R. D. 317.* Before the Court we have two corporations of identical names, except that one is known as the Railroad Company and the other the Railway Company. Known only to the Petitioner was the exact relationship of these two corporations. One was the operator, the other the bond holder. They officed together, had the same agent for service, retained the same general counsel, had the same employees, transacted the same inter-related business and were in fact and effect, the same identical entity. The Petitioner knew from the moment that it received the plaintiff's original complaint which party had been sued and which party was to appear in court and defend this action. It then came into court and defended the action upon *its own merits.* Under these circumstances, can it honestly be asserted that the plaintiff's motion to amend was anything more than an attempt to cure a misnomer of parties, as was held by the Circuit Court of Appeals.

The Petitioner represents to this Court that Rule 17(b) of the Federal Rules of Civil Procedure is controlling. Respondent believes, however, the correct interpretation of this Rule to be that it applies local law only to the ability or capacity of corporate entities to sue or be sued, rather than applying the local law in regard to the method and means of summoning them to court and their procedural conduct after appearing in court.

Further, Petitioner alleges that this matter should be governed by the law of the State of Texas, rather than the Federal case law. They cite the case of *Erie Railroad v. Tompkins, 304 U. S. 64.* That decision clearly holds that substantive matters alone are to be governed by a decision of the courts of various states, and in no manner attempts to apply the law of the local forum to federal procedural matters. Also, in this connection, Respondent would call the Court's attention to the fact that this is a Federal Employers' Liability Act case, brought by force of federal statutes, and the rights of the injured worker are governed by Federal rather than local rules of law. *Bailey v. Central Vermont Railroad, 319 U. S. 350;* and *Dice v. Akron C. & Y. Railroad Co., 342 U. S. 359.*

THE DECISION IN THIS CASE DOES NOT CONFLICT WITH OTHER DECISIONS OF THE FEDERAL COURTS

In his brief, the Petitioner cites a series of cases which he alleges as being in conflict with the decision below. Two of these cases, *Davis v. L. L. Cohen & Co., 268 U. S. 638,*

and *Herbert v. Payne, 291 F. 555*, were cases brought against railroads for injuries sustained while the railroads were under the direction of the Director General of Railroads in 1920. This matter was governed by a specific Federal statute and the statute set forth specifically that the Director General was the person to be sued and that he, alone, was amenable to service of citation and defense of these actions. The Federal courts held that such statute was valid and must be complied with in order to maintain an action. All actions not in conformity to this statute were, therefore, improperly brought. The instant case is brought under no such statute and, therefore, Respondent respectfully submits that the decisions in these two cases are in no way controlling upon the decision in the present case.

The Petitioner also cites the case of *Phoenix State Bank and Trust Co. v. Bitgood, 28 F. Supp. 899*, and *Third National Bank and Trust Co. of Springfield, Massachusetts v. White, 58 F. 2d 411*. In both of these cases, the plaintiff attempted to substitute one Collector of Internal Revenue for another. As the court stated,

> "The sovereign has stated the conditions upon which it consents to be sued and it does not lie within the power of these courts to alter this."

Therefore, it may be seen that this is another specific situation governed by statute and inapplicable to the present suit.

Another case, *Swartz v. Metropolitan Life Insurance Co., 2 F. R. D. 167*, cited by Petitioner, involves the interpreta-

tion of Rule 25, F. R. C. P., which in no way is relevant to the present action. The remainder of the cases cited by Petitioner may also be distinguished on individual grounds and in no wise concern the ability of the Federal Court to allow amendments to correct an inadvertent error in appellation.

THE DEFENDANT ACTUALLY APPEARED IN COURT

The second question presented to this Court was, "Did the defendant know that he was being sued and did he, in fact, appear in court and contest this matter?" Respondent respectfully submits that citation and complaint were duly served. This citation and complaint (R. 1-10) made plain the fact that an injured employee was attempting to assert a claim for benefits granted to him by the Federal Employers' Liability Act. Being fully apprised of the nature and the matters alleged in this suit, the Petitioner went forth and contested this action upon its merits, alleging the validity of a release entered into between the Respondent and itself. It next appeared before the Court of Appeals, still urging its defense. Finally, upon the second pre-trial hearing of this matter, it adopted the role of the chameleon and attempted to disclaim any responsibility or liability. It was then the plaintiff, Respondent herein, filed his motion to amend to correct the alleged misnomer of the party defendant in the original complaint. Under these facts, it seems inconceivable for the Petitioner to honestly assert that the proper party was not called before the Court and did not defend this action upon its merits.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the opinion of the Court of Appeals for the Fifth Circuit was correct and that the Petition for Writ of Certiorari should be denied in all things.

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927 Oil and Gas Building,
Wichita Falls, Texas,
Attorneys for Respondent.

One of Counsel:

PHILIP S. KOURI

I certify that a copy of this reply has been served upon Messrs. Leslie Humphrey, H. W. Fillmore, J. H. Alvis and John B. Pope, attorneys for the Petitioner.

PHILIP S. KOURI

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